

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Accessible Emergency Information, and Apparatus	)	MB Docket No. 12-107
Requirements for Emergency Information and Video	)	
Description: Implementation of the Twenty-First Century	)	
Communications and Video Accessibility Act of 2010	)	
	)	

**COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION**

The Entertainment Software Association (“ESA”) respectfully submits these comments in response to the above-captioned Notice of Proposed Rulemaking (“Notice”).<sup>1</sup> The Notice addresses the application of the Twenty-First Century Communications and Video Accessibility Act (“CVAA”) with respect to two specialized categories of television content—local emergency information and video description—in the limited context of video programming transmitted by television stations and multichannel video programming distributors (“MVPDs”).<sup>2</sup> In light of the congressional intent underlying the CVAA and FCC precedent, the ESA agrees with the Commission that the scope of these requirements should not apply to “IP-delivered video programming that is not otherwise an MVPD service” or to any apparatus not “designed to receive, play back, or record broadcast or MVPD television services.”<sup>3</sup>

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<sup>1</sup> The ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet.

<sup>2</sup> See *Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Notice of Proposed Rulemaking, MB Docket No. 12-107, at ¶¶ 2, 6, 30 & 34 (rel. Nov. 19, 2012); 47 C.F.R. §79.2 (local emergency information) & 47 C.F.R. §79.3 (video description).

<sup>3</sup> Notice at ¶ 6.

## **I. Video Game Consoles Are Correctly Not the Focus of This Proceeding.**

While game consoles continue to focus on game play as their primary purpose and use, all three major consoles currently offer users a variety of video content, both streaming and downloadable, from multiple video providers. Some providers, such as Netflix, provide content on all three console platforms. Other video providers are exclusive to particular platforms. Regardless of the console platform, however, all of this video content relies on broadband, IP, WiFi, or Internet connections to reach the consumer through the console platform.

For instance, Nintendo offers video streaming on both the Nintendo Wii and its new Nintendo Wii U console through third-party applications available on the Nintendo Network.<sup>4</sup> Sony's PlayStation 3 ("PS3") offers an assortment of video-programming applications, such as Amazon Instant Video, MLB.TV, Crackle, and live-streaming access to Sunday NFL Ticket from DirecTV.<sup>5</sup> Users can access a variety of video providers' content on the Xbox 360, as well. Examples include: live-streaming sports coverage on the ESPN app, live baseball games on the MLB.TV app, and the Xbox LIVE Marketplace, which allows users to download a selection of movies and TV shows, as well as, in some cases, provide access to the video-on-demand or real-time programming available from a consumer's MVPD through an IP connection.<sup>6</sup> However, in each of these scenarios, the content is provided via Internet Protocol to the Xbox.

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<sup>4</sup> The recently released Nintendo Wii U offers Nintendo TVii, a feature that allows a user to search across all their available video content from providers like Hulu and Amazon, including his or her MVPD's listings. However, if a user selects a program from his or her MVPD provider, the Wii U assists the viewer in changing the channel on the MVPD set-top box in order to view the program through that box, not the console.

<sup>5</sup> See, e.g., Playstation Network Video and Music Services, **Playstation Network**, available at <http://us.playstation.com/psn/psn-services/>; **Playstation Network**, available at <http://us.playstation.com/psn/nfl/>.

<sup>6</sup> See, e.g., Xbox LIVE Marketplace, available at <http://www.xbox.com/en-US/entertainment/video?xr=shellnay>; **Xfinity TV for Xbox Live**, **Xbox.com**, available at <http://www.xbox.com/en-US/live/partners/xfinity>.

## **II. Local Emergency Information and Video Description Obligations Should Not Extend to Devices Beyond Those That Directly Access Broadcast or MVPD Services.**

The Notice correctly observes that the CVAA intends only that apparatus designed to deliver broadcast and MVPD services—not other IP-delivered video programming—may be subject to its proposed apparatus requirements in this context.<sup>7</sup> As the Notice explains, “Congress did not explicitly extend the scope of the emergency information rules to IP-delivered video programming” and the CVAA instructs the Commission to apply video description obligations only “insofar as such programming is transmitted for display *on television* in digital format.”<sup>8</sup> Had Congress intended to reach IP-delivered programs, it would have explicitly referenced them, as it did in the context of closed captioning.<sup>9</sup> The lack of any similar statutory directive with respect to local emergency information and video description obligations confirms that Congress did not intend these obligations to encompass IP-delivered video programming, or devices designed to access IP-delivered video programming.<sup>10</sup> The Notice’s exclusion of IP-delivered video is appropriate given the focus and language of the CVAA.<sup>11</sup>

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<sup>7</sup> See Notice at ¶¶ 6 & 30.

<sup>8</sup> Notice at ¶ 6 (citing 47 U.S.C. §§ 613(c) & 613(f)(2)(A)) (emphasis added).

<sup>9</sup> See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order, 27 FCC Rcd 787, 788 (¶ 1) (2012) (“*IP Video Captioning Order*”) (differentiating between closed captioning “on television” and “IP-delivered video programming that was not part of a broadcaster or multichannel video programming distributor service”).

<sup>10</sup> Also unlike closed captioning requirements, which applied to virtually all traditional broadcast and MVPD outlets prior to any application to IP-delivered video, the CVAA directs reinstatement of video description obligations as to only a limited subset of broadcast and MVPD outlets and programming, see *Video Description: Implementation of the Twenty First Century Communications and Video Accessibility Act of 2010*, Report and Order, 26 FCC Rcd 11847, 11850, 11859-60 (¶¶ 5, 22) (2011) (requiring video description for 50 hours of prime-time (or children’s) programming per calendar quarter by certain stations or MVPD channels, and for subsequent airings of such programs “if re-aired on the same station or MVPD channel”), which again indicates that Congress did not intend the CVAA to extend these obligation to newer distribution contexts, such as IP-delivered video.

<sup>11</sup> Cf. *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002) (concluding that the Commission did not then have authority to promulgate video description rules on traditional television outlets, even though Congress may not have “expressly foreclose[d] the possibility, in part because of what Congress had directed with respect to closed captioning (but not video description), and also because of the First Amendment and program content implications of video description).

This result is consistent with the Commission’s own precedent. As the Notice details, only video programming distributed by television broadcast and MVPD services are currently subject to the local emergency information and video description requirements of, respectively, Sections 79.2 and 79.3 of the Commission’s Rules.<sup>12</sup> In the recent *IP Video Captioning Order*, the Commission carefully distinguished between captioning requirements for programming distributed by television broadcast or MVPD services and for Internet Protocol or online-delivered video programming, even if a particular program might be available via both means of distribution.<sup>13</sup> By maintaining this distinction in the current proceeding, the Commission would uphold both its established rules and its recent precedent differentiating between online-delivered video and more traditional video distribution in matters relating to accessibility.

The Notice’s proposed conclusion also is consistent with practical realities. On-demand or non-linear programming should not be expected to include local information about a “current emergency,” which is the only sort of information subject to Section 79.2, both because: (i) non-linear programming is generally delivered by a national or other non-local programming source, which is not “primarily intended for distribution to an audience in the geographic area in which the emergency is occurring;” and (ii) non-linear programming is not designed to be viewed live or in real-time, and thus is unlikely to provide still-timely information given the “extremely time

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<sup>12</sup> Section 79.2 applies only to those television broadcast stations or MVPD services that choose to provide emergency information about a “current emergency” and primarily serve “an audience in the geographic area in which the emergency is occurring.” 47 C.F.R. § 79.2(b)(2). It does not include emergency alert information. *See* Notice at note 8. Section 79.3 generally applies video description obligations only to a defined subset of prime-time or children’s programs delivered by television broadcast stations and MVPDs, including five national nonbroadcast networks and certain television stations, and subsequent airings of described programs by these same stations or MVPD channels. 47 C.F.R. § 79.3(b).

<sup>13</sup> *See IP Video Captioning Order*, 27 FCC Rcd at 788 (¶ 1) (2012) (differentiating between closed captioning “on television” and “IP-delivered video programming that was not part of a broadcaster or multichannel video programming distributor service”). In addition, for these purposes, the Commission has clarified that traditional managed video services through which MVPDs offer multiple channels of video programming to their MVPD customers within their service footprint will be treated as MVPD services, including IPTV offerings such as that provided by AT&T. *See id.* at 796 (¶ 11) & n.64.

sensitive” nature of emergency information.<sup>14</sup> Indeed, television broadcast and MVPD services remain the primary sources for delivering emergency video information to a particular area in a timely manner. Accordingly, the Commission also should confirm that any local emergency information requirements adopted in this docket apply only to real-time, linear MVPD or television station transmissions or to devices that are directly accessing such transmissions.

The Notice further asks whether the proposed rules should apply to video game consoles “to the extent an MVPD enables its subscribers to access its MVPD service through these devices.”<sup>15</sup> ESA is not aware of any video game console being used to access MVPD services (or television broadcasts) directly through an MVPD connection. Because video game consoles currently are designed to access “IP-delivered video programming that is not otherwise an MVPD service,”<sup>16</sup> the Commission should not suggest that video game consoles or similar devices are subject to additional apparatus obligations in this proceeding.

### **III. The Commission Should Not Impose Requirements That Unnecessarily Limit the Sort of Devices Designed to Access Video Programming.**

Console makers are currently in a period of considerable experimentation and innovation with respect to IP-delivered video programming. Interactive television experiences and supplemental second-screen content are among other recent innovations. The Commission should not adopt other equipment mandates that unnecessarily limit video apparatus innovation or the sorts of devices that may be available to consumers. Innovation is essential to the

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<sup>14</sup> See Notice at ¶ 21; 47 C.F.R. §§ 79.2(b)(2) & (a)(2); Notice at ¶ 34 (questioning whether emergency information obligations should not apply to removable video players). It is also possible that the mandated retention and distribution of outdated emergency information will have adverse public interest effects; for example, a casual observer of recorded programming may be misled or confused by information that is no longer current or relevant. In other contexts, the Commission has long recognized that false and deceptive information purported to relate to an emergency or potential catastrophe may result in public harm. See, e.g., 47 C.F.R. §73.1217 (prohibiting false information relating to a catastrophe, including a disaster or imminent disaster, that may cause substantial public harm).

<sup>15</sup> Notice at ¶ 30.

<sup>16</sup> Notice at ¶ 6.

development of new video game consoles and other complex consumer electronics. Overbroad regulatory mandates may deter or prevent investment in or development of potential new breakthroughs of broad consumer benefit.

To this end, the Commission should refrain from requiring any specific technical standards in this proceeding, including with respect to “multiple audio services” that may be intended to facilitate delivery of video description.<sup>17</sup> Television standards first developed many years ago may not work for new technologies that enable customers to watch content, and the recent adoption of the current video description requirement has not provided sufficient opportunity for relevant entities to innovate with respect to the delivery of video description.<sup>18</sup> Accordingly, the Commission should uphold and protect manufacturers’ “flexibility to continue to innovate” in this area, as it has in other accessibility contexts.<sup>19</sup>

Similarly, the Commission should clarify that video devices, including those that may be otherwise subject to proposed Sections 79.105 or 79.106 in this proceeding, will not be subject to any text-to-speech (“TTS”) functionality mandates.<sup>20</sup> An unprecedented TTS mandate for any class of video devices will present significant technological and other challenges that will adversely and unnecessarily impact the video-device technology available to consumers. It also

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<sup>17</sup> See Notice at ¶ 26 (asking whether Commission should mandate “the recommendations contained in CEA-CEB21”).

<sup>18</sup> The first calendar quarter subject to the current video description requirements ended less than three months ago, on September 30, 2012. See, e.g., News Release, “Video Description Rules for Certain Broadcast Stations and Multichannel Video Programming Distributors (MVPDs) Are Now in Effect” (rel. July 2, 2012) (available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-314911A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314911A1.pdf)). As the Notice recounts, industry members of the Video Programming Accessibility Advisory Committee also concluded that no mandate for “a single format, protocol or standard for multiple audio services” was required. See Notice at ¶ 26 (citing VPAAC Second Report: Video Description at 26)).

<sup>19</sup> *IP Video Captioning Order*, 27 FCC Rcd at 860-62 (¶¶ 124-26) (refusing to adopt SMPTE-TT as mandated standard, although allowing it as potential safe harbor); see *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rule Making, 26 FCC Rcd 14557, 14567 (¶ 23) (2011) (“ACS Order”) (refraining from adopting any technical standards, as safe harbors or otherwise, for covered entities).

<sup>20</sup> See Notice at ¶ 20.

may not offer any demonstrable benefit, as TTS for text crawls or other unplanned on-screen text generally cannot be accomplished merely by placing a mandated TTS capability on the video playback device.

Finally, the Commission should not impose any new apparatus obligations adopted in this proceeding for at least two years after any such obligations have been adopted and subsequently published. A reasonable phase-in period would provide time to affected manufacturers to come into compliance, and limit any disruption the new obligations may have on what devices may be available to consumers. As the Notice states, a phase-in period also would be consistent with the compliance timeline for devices established in other accessibility contexts.<sup>21</sup>

#### **IV. Conclusion**

For the foregoing reasons, the ESA urges the Commission to adopt its proposed conclusion to exclude devices that access “IP-delivered video programming that is not otherwise an MVPD service” from the current proceeding and to otherwise act consistently with these comments.

Respectfully submitted,

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<sup>21</sup> See Notice at ¶ 27 (citing *IP Closed Captioning Order*, 27 FCC Rcd at 859); *ACS Order*, 26 FCC Rcd at 14601-03 (¶¶ 107-110).